IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4990 OF 2004

Mukesh J.Menda .. Petitioner

versus

Shyam J.Menda & anr .. Respondents

Ms.Veena Thadani for Petitioner

Mr.S.A.Pawar for Respondent no.1.

CORAM : D.G.KARNIK, J

DATED : 17th February, 2006

P.C.

1. Heard learned counsel for the appearing parties.

2. By this petition, the petitioner challenges the judgment and order dated 16th April, 2004 passed by the Cooperative Court, Mumbai.

3. The petitioner and the respondent no.1 are brothers. The suit relates to a flat situate in the respondent no. 2 society. The flat originally belonged to the mother of the petitioner and the respondent no. 1. There is a dispute between the petitioner and the respondent no. 1 regarding the ownership of the said flat. The respondent no. 1 filed a dispute under

section 91 of the Maharashtra Cooperative Societies Act, 1991 before the Cooperative Court for certain reliefs. In the dispute, he claimed that he was a joint/associate member along with the mother and that the respondent no.2 had wrongly deleted his name. He prayed that the resolution of the society deleting his name should be set aside and it should be declared that the transfer made in the sole name of the petitioner is void.

4. The petitioner raised two preliminary objections. He firstly submits that the dispute was not triable under section 91 of the Maharashtra Cooperative Societies Act and secondly contended that the dispute was barred by limitation. The trial Court upheld the contention of the petitioner but, on appeal, the appellate Court reversed the findings of the trial Court. That judgment is impugned in this Writ Petition.

5. It is a settled principle of law that jurisdiction is to be determined on the basis of the averments made in the plaint. The respondent no. 1 has clearly averred in para 1 of the plaint that he was a joint/associate member of the flat alongwith the mother. The respondent no. 2 transferred the flat in the name of the

petitioner. The respondent no.1 claims to be a member. The dispute is clearly a dispute between a member and a past member and the society and is clearly covered by section 91 of the Maharashtra Cooperative Societies Act. In the circumstances, the appellate Court was right in holding that the dispute was triable under section 91 of the Maharashtra Cooperative Societies Act.

6. As regards the point of limitation the appellate Court has held that the decisikon thereon would require evidence and the trial Court could not have dismissed the claim on without evidence. The parties had not adduced evidence on the issue of limitation. In the facts and circumstances of the case, it appears to me that the issue of limitation is a mixed question of law and facts and could not have been decided without evidence. Both the learned counsel state before me that each of them want to adduce the evidence on the issue of limitation. In the circumstances, it cannot be held without trial that the dispute was barred by limitation. The trial Court would have to record a finding on the issue of limitation after recording the evidence on all the issues including the issue of limitation at time of final hearing. With these observations, the petition is rejected.

(D.G. KARNIK, J)

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